General Produce Agency Sdn Bhd & Anor v Collector of Stamp Duty

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-833 OF 1998
ABDUL HAMID MOHAMAD, KC VOHRAH AND MOHD NOOR AHMAD JJCA
19 JUNE 2002

Revenue Law *— Stamp duty — Transfer — Whether first and second appellant exempted from paying stamp duty on transfer instrument by virtue of s 15A(4)(c) of the Stamp Act 1949 — Whether exist imposition of condition by the Foreign Investment Committee which disqualifies the instrument of transfer for exemption from stamp duty — Stamp Act 1949 s 15A(4)(c)*

The first appellant owned over 90% of the equity of the second appellant. In an agreement, the second appellant agreed to purchase a piece of land from the first appellant for a certain consideration. A transfer instrument was executed and an application for exemption of stamp duty on the instrument under s 15A of the Stamp Act 1949 ('the Act') was submitted to the collector. Under s 15A of the Act, stamp duty is not chargeable on an instrument of transfer of property between 'associated' companies — companies where one of them has over 90% of the issued share capital of the other. The collector rejected the application holding that there was a condition which had been imposed by the Foreign Investment Committee ('FIC'), that the second appellant should divest 30% of its equity to a Bumiputera company by a certain date and since there was such an arrangement where the first appellant would cease to have more than 90% of the equity in the second appellant within the meaning of s 15A(4)(c) of the Act, the instrument of transfer did not qualify for exemption from stamp duty. The appellants appealed to the High Court by way of a case stated under s 39 of the Act against the collector's rejection for exemption. The learned High Court judge agreed with the collector's views. The appellants appealed.

Held, allowing the appeal:

(1) Neither the High Court nor the Court of Appeal was procedurally and substantively properly seised of the issues and relevant facts to be able to decide on matters relating to statutory authorities or government committees making decisions which allegedly was in excess of their powers. On the facts, clearly the appellants acceded to the collector's request to them to refer the matter to the FIC and they did not demur to the condition for the approval by FIC of the transaction (see p 692C–E).

(2) Section 15A(4) of the Act is designed to prevent tax avoidance and s 15A(4)(c) is the catch-all provision to prevent tax avoidance. However, in the appeal, there was absolutely no hint that the associated companies had made an arrangement to avoid

paying stamp duty on the first transfer instrument or the second transfer instrument (see p 692F–G).

(3) The FIC was not a party to the fresh agreement entered into between the first and second appellant. In the context of the whole of s 15(A) of the Act there could not be said that an imposition of a condition by a stranger (the FIC) which the appellant felt compelled to abide by meant that the appellant intended to avoid paying stamp duty on the transfer instrument. It would be unjust to interpret s 15A(4)(c) in that way (see p 694A–C).

(4) The restructuring scheme was not for the purpose of tax avoidance. The issue of exemption from stamp duty on the transfer instrument between the first appellant and the second appellant was separate from the issue of the imposition of the condition by the FIC which was a policy matter wherein the remedy for non-compliance of the condition lay elsewhere, not under s 15A (see p 694E–F).

[Bahasa Malaysia summary

Perayu pertama memiliki lebih daripada 90% ekuiti perayu kedua. Dalam satu perjanjian, perayu kedua bersetuju untuk membeli sebidang tanah daripada perayu pertama untuk satu balasan tertentu. Satu suratcara pemindahan telah disempurnakan dan satu permohonan untuk pengecualian duti setem ke atas suratcara tersebut di bawah s 15A Akta Setem 1949 ('Akta tersebut') telah dikemukakan kepada pengutip duti setem. Di bawah s 15A Akta tersebut, duti setem tidak boleh dikenakan ke atas sesuatu suratcara pemindahan hartanah antara syarikat-syarikat 'bersekutu' — syarikat-syaraikat di mana salah satu daripada mereka mempunyai lebih daripada 90% modal saham yang dikeluarkan dari yang lain. Pengutip duti setem telah menolak permohonan tersebut dengan memutuskan bahawa terdapatnya syarat yang telah dikenakan oleh Jawatankuasa Pelaburan Asing ('FIC'), iaitu perayu kedua haruslah melepaskan 30% daripada ekutinya kepada sebuah syarikat Bumiputera pada satu tarikh yang tertentu dan oleh kerana terdapatnya pengaturan yang sedemikian di mana perayu pertama tidak akan lagi mempunyai lebih daripada 90% ekuiti dalam perayu kedua di dalam lingkungan maksud s 15A(4)(c) Akta tersebut, suratcara tersebut tidak layak diberikan pengecualian duti setem. Perayu-perayu telah merayu kepada Mahkamah Tinggi melalui satu kes yang dinyatakan di bawah s 39 Akta tersebut terhadap penolakan pengutip duti setem untuk pengecualian. Hakim Mahkamah Tinggi yang bijaksana bersetuju dengan pandangan pengutip duti setem. Perayu-perayu telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Mahkamah Tinggi mahupun Mahkamah Rayuan tidak menurut prosedur dan secara substansialnya terlucut secara sempurnanya

dari isu-isu dan fakta-fakta relevan untuk dapat memutuskan atau perkara-perkara yang berkaitan dengan autoriti-autoriti berkanun atau jawatankuasa-jawatankuasa kerajaan yang membuat keputusan-keputusan yang mana adalah dikatakan melebihi kuasa mereka. Berdasarkan fakta-fakta, jelas perayu-perayu telah akur dengan permintaan pengutip duti setem kepada mereka supaya merujuk perkara tersebut kepada FIC dan mereka tidak membantah kepada syarat untuk kelulusan oleh FIC bagi transaksi tersebut (lihat ms 692C–E).

(2) Seksyen 15A(4) Akta tersebut adalah direka untuk mencegah perbuatan mengelak cukai dan bahawa s 15A(4)(c) adalah peruntukan segalanya untuk mencegah perbuatan mengelak cukai. Walaubagaimanapun, di dalam rayuan tersebut, tidak terdapat apa petanda sekali pun bahawa syarikat-syarikat bersekutu tersebut telah membuat pengaturan untuk mengelak daripada membayar duti setem ke atas suratcara pemindahan pertama atau suratcara pemindahan kedua (lihat ms 692F–G).

(3) FIC bukannya satu pihak kepada perjanjian baru yang dimasuki antara perayu pertama dan kedua. Dalam konteks keseluruhan s 15(A) Akta tersebut tidak boleh diperkatakan bahawa sesuatu pengenaan syarat oleh seseorang yang tidak dikenali (FIC) yang mana perayu berasa terpaksa dipatuhi bermakna bahawa perayu berniat untuk mengelak daripada membayar duti setem ke atas suratcara pemindahan. Ianya adalah tidak adil untuk mentafsirkan s 15A(4)(c) dengan cara yang sedemikian (lihat ms 694A–C).

(4) Skim penyusunan semula itu bukan bertujuan untuk mengelakkan cukai. Isu pengecualian daripada duti setem ke atas suratcara pemindahan antara perayu pertama dan perayu kedua adalah berasingan dari isu pengenaan syarat oleh FIC yang mana merupakan perkara polisi di mana remedi untuk ketidakpatuhan syarat terletak di tempat lain, bukannya di bawah s 15A (lihat ms 694E–F).]

Notes

For cases on stamp duty on instrument of transfer, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2289–2295.

Cases referred to

Escoigne Properties Ltd v IRC [1958] AC 549 (refd)
Holmleigh (Holdings) Ltd v IRC 46 TC 435 (refd)

Legislation referred to

National Land Code Form 14A
Stamp Act 1949 s 15A(1), (4)(a), (b), (c), First Schedule, item 32(a)

A Finance Act 1930 [Eng] s 27(3)(a), (b), (c)
Finance Act 1940 [Eng] s 42
Finance Act 1967 [Eng] s 27(3)

Appeal from: Originating Motion No 25–63–97 (High Court, Pulau Pinang)

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Rumi Manecksha (*Ong & Manecksha*) for the appellant.
Khairuddin Abdullah (Lembaga Hasil Dalam Negeri) for the respondent.

KC Vohrah JCA (delivering the judgment of the court): Under s 15A of the Stamp Act 1949 ('the Act') stamp duty is not chargeable on an C instrument of transfer of property between 'associated' companies, companies where one of them has over 90% of the issued share capital of the other.

In this case, General Produce Agency Sdn Bhd ('the first appellant') owns over 90% of the equity of General Produce Housing Sdn Bhd ('the D second appellant'). In an agreement, the second appellant agreed to purchase a piece of land from the first appellant for consideration, and a transfer instrument was executed and an application for exemption of stamp duty on the instrument under s 15A was submitted to the collector.

The collector rejected the application holding that there was a E condition which had been imposed by a government committee, the Foreign Investment Committee ('the FIC'), that the second appellant should divest 30% of its equity to a Bumiputera company by a certain date and since there was such an arrangement where the first appellant company would cease to have more than 90% of the equity in the second appellant company within the meaning of s 15A(4)(c) of the Act, the instrument of F transfer did not qualify for exemption from stamp duty.

The two companies appealed to the High Court by way of case stated under s 39 of the Act against the collector's rejection for exemption. The learned High Court judge agreed with the collector's views. Thus this appeal by the two companies.

G The first appellant company has an authorized capital of RM5m divided into 5,000 shares of RM1,000 each, of which 3,600 shares had been issued and fully paid. On the other hand, the second appellant company has an authorized capital of RM10m divided into ten million shares of RM1 each of which 7,520,000 shares had been issued to the first appellant and are fully paid. There are no other shareholders in the second appellant H company save for the first appellant company.

On 15 January 1996, a reconstruction agreement was entered into between the first and second appellant companies wherein it was provided for the sale and purchase of a piece of land registered in the name of the first appellant company for consideration of RM7,800,000.

I We now come to the role played by the collector. On 3 April 1996, the common solicitors for both appellants wrote to the collector for relief from stamp duty under s 15A of the Act in respect of the transfer.

The collector, on 10 April 1996, wrote back requesting a copy of the confirmation from the FIC that approval for the transfer of the land was not needed.

The common solicitors wrote to the collector stating that no approval was required for the transfer but the collector notified the solicitors in a letter dated 26 April 1996 that his office had been informed by the FIC that any transfer involving more than RM5m would require the FIC's approval, although the transfer may be between associated companies and that he was informed by the FIC to let the FIC know of any company which refuses to comply with the FIC requirement (see letter, appeal record, 101).

The solicitors applied to the FIC for approval. The FIC wrote to say (see the letter dated 4 September 1996, appeal record, p 104) that there was no objection to the transaction, provided that the second appellant would have 30% equity for a Bumiputera company before 31 December 1997.

The first and second appellant companies terminated the first reconstruction agreement and a second reconstruction agreement was entered into on 28 October 1996. A fresh memorandum of transfer Form 14A was also executed.

The solicitors then wrote to the collector for exemption from payment of stamp duty under s 15A of the Act on the fresh transfer instrument and enclosed, inter alia, a copy of the fresh agreement and a copy of the consent of the FIC to the transaction.

The solicitors pointed out to the collector that under the fresh agreement the first appellant had agreed to transfer and the second appellant had agreed to buy the said land (subject matter of the transfer in Form 14A of the National Land Code executed pursuant to the fresh agreement) for a consideration of RM7,800,000, such consideration to be satisfied by the second appellant as follows:

(a) to the amount of RM7,020,000 by the allotment and issuance to the first appellant by the second appellant company of 7,020,000 shares of RM1 credited as fully paid up; and

(b) as to the balance amount of RM780,000 by cash.

To be noted is that the nature of the consideration in the fresh agreement was no different from that of the earlier agreement that had been cancelled.

The solicitors stated that as required under s 15A of the Act the following conditions had been satisfied thus:

(i) the effect of the transfer in Form 14A of the National Land Code is to transfer, inter alia, beneficial interest in the land from the (first appellant company) to the (second appellant company);

(ii) the (first and second appellant companies) are associated companies. (The first appellant company) holds one hundred per centum (100%) of the issued share capital of the (second appellant company);

(iii) the consideration for the transfer in Form 14A of the National Land Code shall be received wholly by the (first appellant company);

(iv) the (first and second appellant companies) have not ceased to be associated companies within the meaning of s 15A of the Act.

On 29 April 1997, the collector disallowed the application and sent a notice of assessment on the fresh transfer instrument. The ad valorem stamp duty was assessed under item 32(a) of the First Sch to the Act at RM286,000. The duty was paid on 5 May 1997.

Is stamp duty payable?

Before we go further we need to look at s 15A. Particular attention is drawn to s 15A(4)(c). The relevant provisions, including s 15A(4)(c), read:

> Relief from stamp duty in case of transfer of property between associated companies.
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> (1) Stamp duty under para (a) or (b) of Item 32 in the First Schedule shall not be chargeable on any instrument to which this section applies.
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> Provided that no such instrument shall be deemed to be duly stamped unless either it is stamped with the duty to which it would but for this section be liable or it has been brought to the collector under s 36 and he has certified under s 37 either that the full duty with which it is chargeable has been paid, or that it is not chargeable with duty.
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> (2) This section applies to any instrument with respect to which it is shown to the satisfaction of the collector that the effect thereof is to transfer a beneficial interest in property from one company with limited liability to another such company, and that the companies in question are associated, that is to say, one is the beneficial owner of not less than ninety per centum of the issued share capital of the other, or that a third company with limited liability is the beneficial owner of not less than ninety per centum of the issued share capital of each of the aforesaid companies.
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> (3) ...
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> (4) This section shall not apply to any instrument unless it is also shown to the satisfaction of the collector that the instrument was not executed in pursuance of or in connection with an arrangement whereunder:
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> (a) ...
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> (b) ...
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> (c) the transferor and the transferee were to cease to be associated within the meaning of this section by reason of a change in the percentage of the issued share capital of the transferee in the beneficial ownership (within the meaning of this section) of the transferor or a third company, ...

As was correctly pointed out by the learned High Court judge, the issue for determination was whether the fresh instrument of transfer was executed in 'pursuance of or in connection with an arrangement' (see s 15A(4)) whereunder the first appellant company (the transferor company) and the second appellant company (the transferee company) were to cease being associated within the meaning of s 15A(4)(c) of the Act. This is, of course, in the context of the FIC's conditions of approval, for the transfer of 30% of the equity of the transferee company, to a Bumiputera company.

Before the learned High Court judge and before us, Mr Manecksha submitted that stamp duty was not payable by reason of the fact that at the time of the application for the exemption, and the date of the transfer, the transferor company owned more than 90% of the shares in the transferee company and thus were entitled to exemption from stamp duty under s 15A(1). According to him, it was never the intention of the appellants to relinquish any part of their shares to a third party; that the divestment of 30% of their shares to a third party (within the specified date prescribed by the FIC which date had then been extended) cannot in such circumstances be regarded 'as pursuant to' or 'in connection with' any 'arrangement' made by the appellants, but must be viewed as a condition 'imposed' upon them by the FIC.

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It was his submission that even if, at some future time, the transferee company were to divest 30% of its share in favour of a Bumiputera company, this will be done post facto, and according to him that is outside the ambit of s 15A(4)(c) of the Act.

Encik Ahmad Khairuddin bin Abdullah, counsel for the collector, submitted that in cases such as this, the onus of proof lies on the party claiming the relief (*Holmleigh (Holdings) Ltd v IRC* 46 TC 435 at p 452; *Escoigne Properties Ltd v IRC* [1958] AC 549 at p 564) to show that there was no 'arrangement' whereby the transferor company (the first appellant) were to cease to hold less than 90% of the issued share capital or beneficial ownership of the transferee company.

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He also submitted that on the facts of this case, the appellants were not right in saying that it was the FIC that compelled them to divest 30% of the shares in the transferee company to a third party (a Bumiputera company); that they were not right in saying that the potential divestment was forced upon the party concerned (the transferor company); that it was incorrect to say that there was no 'arrangement' whereby 30% equity in the transferee company would be divested to a Bumiputera company by reason of it being 'involuntary'.

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Counsel for the collector also drew our attention to the fact that the appellants had a choice, upon termination of the first agreement and cancellation of the transfer Form 14A dated 6 March 1996, by reason of not having obtained prior approval of the FIC, whether to proceed or not to proceed with the transaction in question. Upon receipt of the FIC's approval, subject to the condition that the transferee company was to have 30% Bumiputera equity before 31 December 1997 (extended by the FIC), the appellants chose to proceed with the said transfer and a fresh agreement for the sale and purchase of the said land was executed and a fresh instrument of transfer was executed.

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It may be noted that the fresh agreement executed made express reference to the earlier agreement which had been terminated as well as the instrument of transfer which had been cancelled as 'the consent of the FIC to the sale of the said property has not been obtained'. The fresh agreement then made express reference to the shares which were allotted and issued to the transferor company and, that it 'shall form part of the purchase price in

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the event the FIC's consent is subsequently obtained and the vendor sells the said property to the purchaser thereafter'. The fresh agreement also made express reference to the FIC's approval that had been obtained, ie that 'the FIC's consent has now been obtained and the vendor has agreed to sell and the purchaser has agreed to purchase the said property ...'

It was the submission of counsel for the collector that the FIC's approval is clearly a condition precedent to the execution of the fresh agreement. The appellants had a further choice when the approval given was conditional. The appellants at that stage could either abort the sale (as they had done in the first instance) or accept the condition imposed and proceed with the sale. On the facts, they had made a considered decision and again chose to proceed. By executing the fresh agreement, the appellants clearly had accepted the condition imposed by the FIC in relation to the divestment of the 30% imposed. In such circumstances, it was his submission that counsel for the appellants was not right in saying that the appellants were 'compelled' to divest 30% equity in the transferee company to a third party.

Encik Ahmad Khairuddin concluded by saying that by executing the fresh agreement, and in accepting the condition imposed by the FIC, there was therefore an 'arrangement' where the transferor company would ultimately cease to be 'associated' with the transferee company within the meaning of s 15A(4) of the Act as a divestment of a 30% equity stake in the transferee company to a Bumiputera company will have to be complied by 31 December 1997 (which at the time of the hearing in the High Court had been extended to 31 December 1998).

The learned High Court judge was of the view that it was incumbent upon the appellants to prove that they came within the ambit of s 15A(4)(c). While she agreed with the submission by Mr Manecksha that in interpreting the words 'in connection with' and 'arrangement' that liability of an instrument to stamp duty must necessarily be assessed as at the date of the instrument, ie 30 November 1996, however, in interpreting these words she was of the view that effect must also be given to the words 'were to cease to be associated' in s 15A(4)(c) of the Act, which are cast in the future tense. She gave the phrase 'were to cease to be associated' its literal and ordinary meaning and held that the collector had not erred, as at the date of the instrument (ie 30 November 1996) a looking into the future as to whether an 'arrangement' exists, as to whether the transferor company will no longer hold 90% of the equity stake in the transferee company, was needed. She further held on the facts of the case that there clearly was such an 'arrangement', by which arrangement, the transferor company and the transferee would no longer be 'associated' within the meaning of s 15A(4)(c) of the Act, and thus, the instrument of transfer does not qualify for exemption. She was of the view that the collector, therefore, on the facts of the case, did not err in taking into consideration whether there was an 'arrangement' at the time of the execution of the instrument that the appellants would cease to be 'associated' in the future.

With respect, we do not agree with the learned judge's decision.

Before we proceed further, let us dispose of the point raised by Mr Manecksha that nowhere in s 15A of the Act is there a requirement for approval by the FIC before exemption under s 15A is given. We agree that there is no express provision. The point, however, is, and this was observed by the learned High Court judge, the appellants acceded to the request of the collector to refer this matter to the FIC and cancelled this first agreement. True, if they did not refer the matter to the FIC, the collector, in all probability, would not have entertained the application for exemption but that decision, in our view, could have been properly challenged under different proceedings in the High Court.

Then again, having been informed of the FIC's decision that the second appellant had to divest 30% of its equity to a Bumiputera company or companies it was open to the appellants to have appealed to the FIC or to have the decision similarly challenged.

Our view is that neither the High Court hearing the appeal by way of case stated nor this court hearing the appeal on the decision of the High Court is procedurally and substantively properly seised of the issues and relevant facts (and further, so far as the FIC is concerned, the body is not represented in the proceedings) to be able to decide on matters relating to statutory authorities or government committees making decisions which allegedly are in excess of their powers. On the facts, clearly the appellants acceded to the collector's request to them to refer the matter to the FIC and they did not demur to the condition for the approval by the FIC of the transaction.

Our remit is to consider whether on the law and on the facts adduced the collector was right in rejecting the application for exemption under s 15A. Was the transfer of land from the first appellant to the second appellant effected in pursuance of an arrangement where the two companies were to cease to be associated by reason of a change in the percentage of the issued share capital within the beneficial ownership of the transferor, ie the first appellant?

We would like to point out that a similar provision, s 27(3) of the English Finance Act read with s 42 of the Finance Act 1940, which together with three subsections — (a), (b) and (c) (like our sub-ss (a), (b) and (c) of s 15A(4)), was enacted with the intention of closing loopholes revealed by tax avoidance schemes. As was observed by *Monroe and Nock: Law of Stamp Duties,* (5th Ed) at p 320, footnote 46:

> Most earlier avoidance schemes involved variations on one or other of the following two themes.
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> THEME A. Company 1 wishes (in effect) to sell property to company 2. It forms company X as its wholly owned subsidiary and sells the property to company X for shares renounced in favour of company 2 for cash. If relief is obtained on the transfer to company X, no stamp duty is payable. This theme was the basis of the unsuccessful claim for the relief in *Holmleigh (Holdings) Ltd v IRC* (1958) 46 TC 435, and the successful scheme in *Shop and Store Developments Ltd v IRC* [1967] 1 AC 472.

> THEME B. Company 1 wishes (in effect) to sell property to company 2. It forms company X as its wholly owned subsidiary and sells the property to company X, leaving the purchase price outstanding as a debt (either to company 1 or a bank). The shares in company X are still of very small value and are sold to company 2 attracting very little duty, or company 2 is permitted to subscribe for shares in the transferee company. Again, if the relief is obtained on the transfer to company X, stamp duty is avoided. This theme was the basis of the unsuccessful claim for relief in *Curzon Offices Ltd v IRC* [1944] 1 All ER 606, and of the successful scheme in *Times Newspapers Ltd v IRC* [1973] Ch 155.
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> Both these themes are now clearly useless by virtue of FA [Finance Act] 1967, s 27(3)(c).

We next look at the expression 'in connection with' and 'arrangement' appearing in s 15A(4)(c), a provision similar to s 42 of the English Finance Act 1930, read with s 27(3) of the Finance Act 1967. As to their meaning, counsel for the collector and the High Court judge relied on this passage from *Monroe and Nock* at p 335 where the authors commented on these words used in s 27(3) of the Finance Act 1967 which are substantially similar to the words used in s 15A(4)(c) of our Act:

> Generally it is to be observed that the words 'in connection with' and 'arrangement' used in s 27(3) of the Finance Act 1967 are very wide. There need be no legally binding nexus between the conveyance or transfer and the offending arrangement in connection with which it is executed, but it is conceived that as the liability of an instrument to stamp duty must be capable of assessment at the date of the instrument, the arrangement must be in existence (the parties thereto being identified) at that time and a mere intention to enter into a relevant arrangement if a suitable opportunity arises is not sufficient. At any rate the arrangement must (if it is not already in the past) be one under which either expressly or by necessary inference the offending act or event will be performed or occur, it is not enough that it will probably be done or occur.

We think, however, that the passage quoted supports the appellants' appeal.

We know that s 15A(4) of the Act is designed to prevent tax avoidance and that s 15A(4)(c) of the Act is the catch all provision to prevent tax avoidance. However, in the appeal before us there is absolutely no hint that the associated companies have made an arrangement to avoid paying stamp duty on the first transfer instrument or the second transfer instrument. From the first agreement, it is clear that no other party was involved in the earlier arrangement to transfer the said land, and clearly there was no issue of an unassociated party buying part of the shares which the first appellant company held in the second appellant company and diluting its beneficial ownership of the second appellant company.

As for the fresh agreement, clearly too there was no arrangement by the appellants to avoid paying stamp duty on the fresh transfer instrument of the same property on the same consideration. Though there is reference in the second agreement to the consent of the FIC to the transfer with the condition that 30% of the equity of the second appellant company be divested to a Bumiputera company by a certain date, that condition is a

condition which reflected the policy of the FIC, a government committee, for the restructuring of the two companies to accommodate Bumiputera interests meaning that the FIC intended that the first appellant company sell at least 30% of its share in the second appellant company to a Bumiputera company so that the Bumiputera company would have a 30% equity in the second appellant company by a certain date. The FIC was not a party to the fresh agreement entered into between the first and second appellant companies. In the context of the whole of s 15(A) of the Act cannot be said that an imposition of a condition by a stranger (the FIC) which the appellant companies felt compelled to abide by meant that the appellant companies intended to avoid paying stamp duty on the transfer instrument. It would be unjust to interpret s 15A(4)(c) of the Act in that way.

The next consideration to be made is that the divestment of the equity is to a Bumiputera company which has yet to be identified. There would have to be first of all a Bumiputera company that would be willing to be involved in the business objectives of the second appellant company and secondly, for the company being willing to pay the price to the first appellant for buying the equity according to market forces. Clearly, by its very nature the condition imposed by the FIC is dependent on the willingness of a Bumiputera company to be involved in the purchase of the shares which may not even materialize. The condition contains matters which are uncertain as to the identity of the purchaser and the time that event of divestment will be realized; in fact, the condition may or may not be realized. We know for a fact that the FIC had to extend the first date of 31 December 1997 by which the second appellant would have 30% equity for a Bumiputera company.

Our view is that the restructuring scheme is not for the purpose of tax avoidance. Our view is that the issue of exemption from stamp duty on the transfer instrument between the first appellant and the second appellant is separate from the issue of the imposition of the condition by the FIC which is a policy matter where the remedy for non-compliance of the condition lies elsewhere, not under s 15A of the Act. From the facts pertinent to this case, we are of the view that the justice of the case shows that s 15A(4)(c) of the Act does not apply and the fresh transfer instrument is exempt from stamp duty. Thus, the collector was wrong in rejecting the application for exemption of stamp duty.

We allow the appeal with costs and we order the assessment paid on the transfer instrument be refunded. Deposit to be refunded to the appellant.

Appeal allowed.

Reported by Peter Ling